80-1563

No.

Office-Supreme Court, U.S.
FILED
MAR 14 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC.
AND NORTH-WEST INSURANCE COMPANY,
Petitioners,

versus

EDGAR J. BOUDLOCHE AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq., as amended in 1972, is intended to afford coverage to a truck driver who spends a minimal percentage of his time performing admittedly longshoring operations: i.e., loading cargo directly from barges to his truck and vice-versa.

LIST OF PARTIES, PARENT AND SUBSIDIARY COMPANIES

1. Edgar J. Boudloche.
2. Howard Trucking Company, Inc.
   A) Howard Construction Company, Subsidiary or related company.
3. Mid-Continent Underwriters, Inc.
4. North-West Insurance Company.
5. United States Department of Labor.

TABLE OF CONTENTS

Page

Questions Presented For Review i

List of Parties, Parent & Subsidiary Companies i

Opinions of the Lower Courts and Tribunals 2

Jurisdictional Grounds 2

Statutes Involved 3

Statement of the Case 4

Argument 5

Conclusion 16

Certificate 17

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Boudloche v. Conoco Oil Co., 615 F.2d 2687 (5th Cir., 1980) 15

Fusco v. Perini North River Associates, 444 U.S. 1020, 100 S.Ct. 697, 62 L.Ed.2d 664 (1979), remanded, 622 F.2d 113 12

Howard v. Rebel Well Service, 632 F.2d 1348 (5th Cir., 1980) 11,12

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES (Continued)

Page

Maher Terminals, Inc. v. Farrell, 548 F.2d 476 (3rd Cir., 1977) 14

Nacirema Operating Company v. Johnson, 396 U.S. 212 (1969) 5

Northeast Marine Terminal Company v. Caputo, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977) 5,16

P. C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) 5,8,12,16

Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs, 540 F.2d 629 (3rd Cir., 1976) 14

Weyerhaeuser Company v. Gilmore, 528 F.2d 957 (9th Cir., 1975), cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976) 13

White v. Newport News Shipbuilding and Dry Dock Company, 633 F.2d 1070 (4th Cir., 1980) 15

Other Authorities:

28 U.S.C., Section 1254 2

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq., as amended in 1972 ..... i,4

Section 2(3) 3,5

Section 3(a) 3,4,5

TABLE OF AUTHORITIES (Continued)

Page

Section 21(b)(2) 4
Section 21(b)(3) 4

H.R. Rep. No. 92-1441, 92d Cong. 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08 7

S. Rep. No. 92-1125, 92d Cong. 2d Sess. 12 13 (1972) 7

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EDGAR J. BOUDLOCHE,
Plaintiff-Respondent,

and

UNITED STATES DEPARTMENT OF LABOR,
Intervenor-Respondent,

versus

HOWARD TRUCKING COMPANY, INC.
AND NORTH-WEST INSURANCE COMPANY,
Defendants-Petitioners.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

OPINIONS OF LOWER COURTS AND TRIBUNALS

1. Opinion of the Administrative Law Judge, dated 3/29/78 entitled: In Re Edgar J. Boudloche v. Howard Trucking Company, Inc. and North-West Insurance Company, Case #77-LHCA-1095, OWCP #7-40125. (Appendix A)

2. Opinion of the Benefits Review Board, dated 12/11/79 entitled: Edgar J. Boudloche v. Howard Trucking Company, Inc. and North-West Insurance Company, Benefits Review Board #78-383. (Appendix B)

3. Opinion of the United States Court of Appeals for the Fifth Circuit, dated 12/19/80 entitled: Edgar J. Boudloche v. Howard Trucking Company, Inc., North-West Insurance Company and Director, Office of Workers' Compensation Programs, U.S. Department of Labor* reported at 632 F.2d 1346. (Appendix C)

JURISDICTIONAL GROUNDS

The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254. Petitioner seeks a review of the decision of the Fifth Circuit Court of Appeals, dated and entered on December 19, 1980. In its decision, the Fifth Circuit Court of Appeals decided that Edgar

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* The U.S. Department of Labor filed briefs and argued to reverse.

Boudloche fell within the purview of the Longshoremen's and Harbor Workers' Compensation Act and reversed the decisions of the Benefits Review Board and Administrative Law Judge.

STATUTES INVOLVED

The statute involved herein is known as the Longshoremen's and Harbor Workers' Compensation Act. The particular sections involved are:

33 U.S.C. — SEC. 2(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. — SEC. 3(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) Any officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

STATEMENT OF THE CASE

In the case at bar, Edgar Boudloche proceeded via the administrative process seeking benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq. The case was initially tried before an Administrative Law Judge, who rendered a decision in which she opined that Mr. Boudloche did not have the status of a longshoreman (Appendix A). Boudloche then appealed pursuant to 33 U.S.C., Section 21(b)(2) and (b)(3) to the Benefits Review Board. In a decision dated December 11, 1979, the Benefits Review Board affirmed the Administrative Law Judge in a 2-1 decision (Appendix B). Pursuant to 33 U.S.C., Section 21(b), Boudloche sought review of the latter decision to the United States Court of Appeals for the Fifth Circuit. The decision of the Fifth Circuit Court of Appeals reversed the decisions of the lower tribunals (Appendix C). It is respectfully sub-

mitted that a Writ of Certiorari should be granted for the following reasons:

1) There is a conflict between circuits as to when a person acquires the "status" of a longshoreman;

2) The decision of the Fifth Circuit Court of Appeals is contrary to the intent of Congress and the decisions of the United States Supreme Court in *Northeast Marine Terminal Company v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), and *P. C. Pfeiffer Company Inc. v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979).

ARGUMENT

In 1972 Congress enacted sweeping amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Prior thereto, with the exception of injuries occurring on dry docks, the coverage of the act extended only to claimants injured seaward of the gang plank. *Nacirema Operating Company v. Johnson,* 396 U.S. 212 (1969). The 1972 amendments changed the "situs" requirements and added a "status" test, extending coverage to claimants "engaged in maritime employment, including any longshoreman or other person engaged in longshore operations, and any harbor worker, including a ship repairman, a ship builder, and ship breaker—." See, generally, 33 U.S.C., Section 902(3) and Section 903(a). With regard to "status" this court said in *Northeast Marine Terminals v. Caputo,* supra:

"The example (referring to the Senate-House reports*) clearly indicates an intent to cover those workers involved in the essential ele-

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* The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

ments of unloading a vessel — taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the site, but are not engaged in the overall process of loading or unloading vessels are not covered. Thus, employees, such as *truck drivers,* whose responsibility on the water front is essentially to pick

---

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S. Rep. No. 92-1125, 92d Cong. 2d Sess. 12 13 (1972); H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin News, pp. 4707-08.

> up or deliver cargo unloaded from or destined for marine transportation are not covered." (Emphasis added.)

In *P. C. Pfeiffer Company, Inc. v. Ford*, supra, this court refined the determination of "status" by stating that the claimant's overall employment must be viewed. This court said:

> "The crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. — A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process. — Ford and Bryant were engaged in maritime employment because they were engaged in intermediate steps of moving cargo between ships and land transportation.
>
> "Our decision serves the intent of Congress in creating the status requirement. First, it focuses upon the nature, not the location of employment. Second, it does not extend coverage to all workers in the situs area."

On February 5, 1975 Boudloche was injured while in the performance of his job as a trucker employed by Howard Trucking Company, Inc. North-West Insur-

ance Company is the workmen's compensation insurer of Howard Trucking Company, Inc. On the above date he had driven his truck to a shell incline near Belle River, Louisiana and was in the process of loading small seismographic boats onto his truck for shipment to a land site. One of the boats fell on Boudloche and severely injured him. A more complete description of the facts are in the decision of the lower court and tribunals (Appendices A, B & C).

In the case at bar, the majority of the Benefits Review Board stated that the "moment of injury" test was not a viable test to determine "status" of an injured employee, i.e. the overall occupational requirements of the employee must be viewed rather than the job he is performing at the time of the accident. Further, the Benefits Review Board said that since Boudloche was essentially a trucker, his overall occupational requirements were not of such a nature as to bring him within the status requirements of the Longshoremen's and Harbor Workers' Compensation Act.

The Court of Appeals side-stepped the issue of whether the "moment of injury" test was a viable test and held that the overall job requirements of Boudloche were such that he met the status test. The court said:

> "In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), the Supreme Court held the Act's

status requirement was met by a terminal laborer who sometimes worked at shore-based jobs and at other times performed a longshoreman's function. They defined longshoremen as 'persons whose employment is such that they spend at least some of their time in indisputably longshoring operations %y(4)'. 432 U.S. at 273, 97 S.Ct. at 2362. Two years later, in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the Court held status coverage extended to two land-based workers who handled ships' cargo only after it had come to rest following discharge. Determining that both men were engaged in the type of duties that longshoremen perform — moving cargo between ships and land transports — the court decided that coverage under the Act was to be determined by what workers were required to do and not in terms of when or where they were required to do work. 'A worker responsible for some portion of that (longshoring) activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.' 444 U.S. at 81, 100 S.Ct. at 337, 62 L.Ed.2d at 236.

* * *

"Boudloche was directed to regularly perform *some* portion of what was indisputably

> longshoring work at fully equipped docks and, for at least *some* part of his work, was required to perform the total maritime job at unequipped docks. The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make Boudloche a maritime employee under the Act."

In a companion case, decided the same day, *Howard v. Rebel Well Service,* 632 F.2d 1348 (5th Cir., 1980) the court was faced with a similar factual situation except that the plaintiff, *Howard,* was a sandblaster and painter. The court said:

> "A majority of the Board found no evidence that Howard individually spent even 10 percent of his time working on equipment from Rebel's barge rigs. Under its 'substantial-part-of-his-time' test, it therefore concluded that claimant failed to establish that he regularly spent a substantial part of his job time in indisputably maritime employment.
>
> "The Board's basis for denial of benefits to Howard was both legally and factually wrong. *Pfeiffer* defines status in terms of workers who perform 'some portion' of a maritime activity such as ship repair. *Caputo* defines status in terms of workers who spend 'at least some of their time' in ship repair. Neither holding re-

> quires that workers meet a 'substantial' standard. See *Boudloche*, supra."

It is our position that the decision of the Court of Appeals, in this case, as well as in *Howard v. Rebel Well Service*, supra, results in an application of the Longshoremen's and Harbor Workers' Compensation Act which is contrary to the intent of Congress and previous decisions of this court.

This court, in accordance with its decision in *Pfeiffer*, vacated and remanded the decision of the Second Circuit in *Fusco v. Perini North River*, 444 U.S. 1020, 100 S.Ct. 697, 62 L.Ed.2d 664 (1979). On remand, the Second Circuit said in *Fusco v. Perini North River Associates*, 622 F.2d 113, writs denied after remand:

> "While the *Ford* case does not deal with construction work and the opinion does not address itself to the question of whether the 1972 amendments have the effect of depriving any class of workers of benefits which it would have enjoyed under the pre-1972 law, we read the opinion as precluding any application of the LHWCA as amended in 1972, to an employee whose activities *do not bear a significant relationship to navigation or to commerce on navigable waters.*
>
> "That reading is consistent with the construction of Sec. 2(3) of the LHWCA given in

this case by the Benefits Review Board and given earlier by *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir., 1975), cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976). It is also consistent with the specific instances of 'maritime employment' set forth in the Sec. 2(3) definition of employer —." (Emphasis added).

The 9th Circuit in *Weyerhaeuser Company v. Gilmore*, supra, said:

"The 1972 amended pre-requisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential elements of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of the recovery by an injured ship worker for maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employer arising in the course of his employment; i.e., the perils of the sea and the unseaworthy vessel recognized under maritime laws. Accordingly, we believe that to be entitled to benefits of LHWCA an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise, the clear and unambiguous congressional language of 'mari-

time employment' is nullified and rendered to read 'any employment'.

"We hold that for an injured employee to be eligible for federal compensation under LHWCA his own work and employment as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce in navigable waters' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Sec. 903. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 408 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) —."

The Third Circuit has a similar requirement. In *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir., 1976), when speaking of the "status" requirement, the court stated:

"The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing."

In *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir., 1977) the Third Circuit, when attempting to define the "status" test, said:

> "What is controlling is the nature of his primary duties. As we perceive the congressional intent, this is the sole test. Farrell's primary duties being that of a clerk and not a checker, he is excluded from coverage."

The Fourth Circuit has adopted a similar test. See *White v. Newport News Shipbuilding and Dry Dock Company*, 633 F.2d 1070 (4th Cir. 1980).

This court, lower courts and the Congressional Reports specifically mention truckers as being the type of workers *excluded* from coverage. In the case at bar, Boudloche's primary responsibility and job was that of a trucker to transport goods on the land side of the water commerce/land commerce interface. Admittedly, at times Boudloche's responsibility as a trucker would bring him briefly within the ambit of longshoring operations. This brief interlude, however, did not amend or change, but merely supplemented his overall responsibility as a trucker. The decision in this case of the Fifth Circuit leads to the conclusion that anyone who spends "some" time in longshoring activities is a longshoreman, no matter what relationship his overall job has with maritime commerce.*

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* It is indeed ironic that Boudloche filed a tort suit against several parties seeking damage for the same accident. On appeal by Boudloche from a dismissal of his claim by the district court, the Fifth Circuit Court of Appeals specifically held that Mr. Boudloche's claim did not fall within the admiralty jurisdiction of the court. See *Boudloche v. Conoco Oil Co.*, 615 F.2d 2687 (5th Cir. 1980).

It is respectfully submitted that this court should review thoroughly the decision of the Fifth Circuit Court of Appeals because it creates a conflict within the circuits, is contrary to the decision in *Northeast Marine Terminal Co., Inc. v. Caputo*, supra, and *Pfeiffer Co., Inc. v. Ford*, supra, as well as the congressional intent behind the act.

CONCLUSION

In conclusion, it is respectfully requested that this Court grant a Writ of Certiorari and review the decision of the Fifth Circuit Court of Appeals and reverse it.

ROGER J. LARUE, JR.
Attorney of Record
for Petitioners
4631 W. Napoleon Avenue
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CERTIFICATE

The undersigned counsel of record hereby certifies that service has been effected by placing three copies of the foregoing Petition in the United States mail, postage prepaid on all parties required to be served listed below on the ____ day of March, 1981.

1. Edgar J. Boudloche, through his counsel of record:
   Mr. Christopher B. Siegrist
   WEIGAND & SEIGRIST
   (A Professional Law Corporation)
   P. O. Box 6062
   7 Progressive Boulevard
   Houma, Louisiana 70361

2. Director, Office of Workers' Compensation Programs, through the U.S. Dept. of Labor, Office of Solicitor, Laurie M. Streeter, Associate Solicitor for Employee Benefits, U.S. Dept. of Labor, 200 Constitution Avenue, North West, Suite N-2620, Washington, D.C. 20210.

ROGER J. LARUE, JR.

Appendices

APPENDIX A

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700—1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

EDGAR J. BOUDLOCHE,
Claimant,

versus

HOWARD TRUCKING CO., INC.,
Employer,

and

NORTH WEST INSURANCE CO.[1],
Carrier.

Case No. 77-LHCA-1095
OWCP No. 7-40125

Christopher B. Siegrist, Esquire
P.O. Box 6062
Houma, Louisiana 70360
For the Claimant

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1 Upon motion of Respondents (the employer and carrier jointly), North West Insurance Co. has been substituted as the proper insurer in place of Mid-Continent Underwriters, the broker for said insurer.

Roger J. Larue, Jr., Esquire
P.O. Box 30807
New Orleans, Louisiana 70190
For the Employer
and Carrier

Before: JOYCE CAPPS
Administrative Law Judge

DECISION AND ORDER

In this proceeding arising under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act), Claimant is seeking compensation for temporary total disability from date of injury and continuing as a result of injuries sustained by him on February 5, 1975.

Issues for determination are (1) whether Claimant was engaged in maritime employment at the time of his injury, and (2) nature and extent of disability.

The following post-hearing documents have been submitted: (1) deposition of Edgar J. Boudloche, the claimant herein, taken on December 27, 1977, (2) deposition of Dr. Roy J. Dugas taken on December 9, 1977, (3) deposition of Kenneth J. Bergeron taken on January 13, 1978, and (4) bills of lading and invoices pertaining to work done by Claimant during 1974 and 1975 up to the time of his injury. These documents are

hereby received in evidence and made a part of the record as Claimant's Exhibits 1 and 2 and Respondents' Exhibits 1 and 2, respectively.

Findings of Fact

Claimant is 59 years old and has had only one year of schooling. Although he can sign his name, he is unable to read or write. He has worked as a farmer, a hospital orderly, and for the past 28 years as a truck driver.

On February 5, 1975, Claimant was employed by Howard Trucking Co., Inc. as a truck driver at an average weekly wage of $125.00. Howard Trucking is engaged in the business of picking up and delivering oil-field and marine equipment and materials (i.e., various types of boats, drill pipes, pipe casings, tongs, elevators, tools, etc.) used in drilling for oil and gas both off-shore and on land.

At least 50% of Claimant's pick-ups and deliveries were to and from a dock. Whenever he went to a dock area it was to pick up or deliver cargo that had come off of or was destined to be loaded onto a barge or other vessel. The rest of his runs were from a land site such as a warehouse to another land site such as a land well or rig. A driver is responsible for the safety of his truck and for the equipment being hauled.

Most of the time Claimant drove a large 18-wheeler truck with a float and hauled heavy oil-field equip-

ment. Most of the dock facilities he went to had the necessary equipment and personnel (roustabouts) to load or unload equipment from the truck to the barge or off the barge onto the truck float. Even when making a delivery at one of these well-equipped facilities Claimant was required to unsecure the equipment on his truck and help the crane operator hook the crane slings or cables to the equipment to be hoisted from the truck to a barge. These activities were part of his routine normal duties. Furthermore, the drivers are generally expected to give whatever assistance they can in the loading and unloading operations as a matter of good will for Howard Trucking. When cargo was being hoisted by crane off a barge onto the truck Claimant was required to position his truck and signal the crane operator where to lower the cargo onto the truck.

Depending on what was being delivered to a dock facility, Claimant sometimes (but not frequently) drove his truck onto a barge which was towed out to off-shore rigs and platforms. He would have to secure his truck-trailer to the barge by chaining it down. Claimant would then be required to help unload the equipment or materials from his truck to the rig or platform.

In short, it was part of Claimant's job to help load or off-load the equipment and materials he hauled.

Between 10% and 20% of the docks Claimant went to had no loading or unloading equipment or personnel. At those dock areas the driver is expected to load or unload his cargo the best way he can — sometimes without any assistance at all. In such instances he had to go aboard the barge to hook up his winch lines to the equipment and materials on the barge, and in the reverse situation he had to secure the equipment and materials to the barge. Claimant estimated that 2-3 times a week he had to load or unload cargo without assistance from anyone.

On the day he was injured (February 5, 1975) Claimant had been dispatched to the Conoco Dock at Belle River to pick up two pull boats and two skiffs and take them to Arc Welding at Thibodeaux, Louisiana. His truck was equipped with a flatbed trailer (also called a float) and a winch. A barge had brought the boats to the dock which was in reality a gravel-shell road leading out of the water. When Claimant arrived the boats were afloat and tied up to keep them from drifting. Claimant backed his truck-trailer to about two feet from the water. He ran his winch line from the back of his cab across the tail board and tied it to the front of the boat. He then went back to his truck and winched the boat out of the water and onto the float. He did the same thing with a second boat. He had some difficulty with the third boat (which was made of steel and weighed about 500 pounds) because there was not enough room left on the float. Therefore, with the help of five other men he was involved in lifting the back end

of the boat so it could be pushed over the rolling tail board when the boat slipped. The boat fell on Claimant.

Claimant sustained fractures to his pelvis, destruction of the external sphincter which determines the voluntary control of the bladder, and his protatic urethra was severed. On February 6, 1975, he underwent surgical placement of a suprapublic tube in the bladder. Said tube remained in place until Claimant's hospitalization from June 1 through 25, 1975, during which time a transpublic urethroplasty was performed (i.e., the prostatic urethra was connected to the bulbus urethra. As a result of that operation Claimant developed a relatively severe stricture which will require him to be hospitalized for a urethra dilatation every three or four months for the rest of his life. He has also developed a renal stone which so far has presented no problems, but if it ever does it will have to be surgically removed.

The pelvic fracutres have healed, but Claimant is seen by his urologist every two months. He is presently taking medication for his nerves. He is unable to control urination and must wear a diaper and rubber pants. He is unable to perform manual labor and has been instructed by his doctor not to lift more than 20 pounds.

As a result of the injuries he sustained on February 5, 1975, Claimant has been temporarily and totally dis-

abled since then and continues to be so disabled.[2]

It is established by stipulation of the parties that ever since the accident the carrier has paid and is continuing to pay Claimant compensation under the Louisiana State Compensation Act for temporary total disability at the rate of $65.00 per week. The carrier has also paid all medical expenses to date.

At the hearing of this matter Respondents' stated position on the issue of coverage was that at the time he was injured Claimant was not engaged in maritime employment. The situs requirement was not mentioned, and yet they raise the question of situs in their brief. Their contentions on this point have come too late and for that reason have not been considered in this decision.

Conclusions of Law

1. It has been established to my satisfaction that Claimant's duties as a truck driver for Howard Trucking involved not only hauling equipment and materials but also loading and unloading such items directly from his truck to vessels or directly from vessels to his truck, often times without assistance. Even in those in-

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2 In his brief Claimant for the first time states he is claiming compensation for temporary total disability, or alternatively, for permanent total disability. At the onset of hearing he claimed only temporary total disability and continuing. Therefore, the matter of permanent total disability has not been considered by me.

stances where heavy-duty equipment and roustabout crews were available to do the great bulk of the work, Claimant at least helped in the loading and unloading process. Thus, during the relatively small amount of work time Claimant spent at a dock site he performed some of the duties of a roustabout with respect to the equipment and materials he picked up or delivered to and from those areas.

However, the fact that Claimant performed some roustabout duties is not enough to confer upon him the status of an "employee" within the meaning of Sec. 2(3) of the Act. The equipment and materials he handled were used in drilling for oil and gas both off-shore and in-land. He never handled commercial goods and commodities which had been or were destined to be transported in vessels used in trade or commerce. Therefore, he did not have "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters * *" which an injured worker must have in order to be covered under the Act. *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975). It is clear that Claimant's primary duties as a truck driver and his roustabout duties incidental thereto cannot be thought of as "maritime employment" in the traditional sense.

In the first-impression case of *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713 (1977), the Benefits Review Board held that a roustabout who was injured by a pump while working on a fixed oil well platform on

navigable waters 60 feet off-shore was not an employee under the Act because his duties lacked any significant maritime connection. The Board applied the general rule that "unless the activity bears a significant relationship to the traditional interests of admiralty in maritime commerce, actions arising from such activities will not be considered maritime for the purpose of applying maritime law." (at p. 718). The Board held the same way for the same reasons in the case of *Toups v. Chevron Oil Co.*, 7 BRBS 261 (1977), involving a pumper-gauger who was working on an oil and gas production platform on navigable waters about three miles from the shoreline. The Board stated in both cases that the only maritime connection with the workers' employment was the fact that the platforms on which they were injured were situated in navigable waters.

In view of the Board's rulings in *Anderson* and *Toups* it would appear that in the instant case since Claimant was injured while attempting to load onto his truck a boat used in off-shore drilling for gas and oil, he similarly is not covered under the Act because that activity lacks an even less significant relationship to the traditional interests of admiralty in maritime commerce than existed in those cases.

It is concluded that at the time of his injury Claimant was not engaged in maritime employment within the meaning of Sec. 2(3) of the Act and, therefore, is not entitled to compensation or benefits thereunder.

2. In view of the foregoing conclusion it is not necessary to address the disability issue.

3. Since Claimant did not prevail in his claim no attorney's fee or costs may be approved or ordered. *Director, OWCP v. Hemingway Transport, Inc.*, 1 BRBS 73 (1974).

/s/ JOYCE CAPPS
JOYCE CAPPS
Administrative Law Judge

Dated: March 29, 1978
Washington, D.C.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

EDGAR J. BOUDLOCHE,
Claimant-Petitioner,

versus BRB No. 78-383

HOWARD TRUCKING COMPANY, INC.
and
NORTHWEST INSURANCE COMPANY,
Employer/Carrier-
Respondents.

Filed as part of the Record: Dec. 11, 1979

/s/ AGNES KURTZ
Clerk
Benefits Review Board

DECISION AND ORDER

Appeal from the Decision and Order of Joyce Capps, Administrative Law Judge, United States Department of Labor.

Christopher B. Siegrist, Houma, Louisiana, for the claimant.

Roger J. Larue, Jr. (Organ & Larue), Metairie, Louisiana, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by the claimant from a Decision and Order (77-LHCA-1095) of Administrative Law Judge Joyce Capps pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant, Edgar J. Boudloche, was injured in the course of his employment with Howard Trucking Company (hereinafter, employer) when a five hundred pound steel boat fell upon him crushing his pelvis. He filed a claim for compensation under the Act. A formal hearing was held before Administrative Law Judge Joyce Capps. Claimant sought compensation for temporary total disability from the date of the injury and continuing, claiming that he had not yet attained maximum medical improvement. Employer controverted the claim, arguing that it was not within the jurisdiction of the Act because the claimant was not engaged in maritime employment. Employer also controverted the nature and extent of claimant's disability.

Administrative Law Judge Capps denied the claim concluding that claimant was not engaged in maritime

employment within the meaning of Section 2(3) of the Act. 33 U.S.C. §902(3). Claimant has appealed this Decision and Order, arguing that he was within the jurisdiction of the Act because he was a maritime employee.

Employer was engaged in the business of transporting oil field and marine equipment used in drilling for oil and gas offshore and on land. Claimant drove a large eighteen-wheel rig with a flatbed trailer. His trailer was equipped with a winch. Claimant hauled heavy oilfield equipment with his truck. Approximately half of claimant's runs were from one land-based site to another. The other half of claimant's runs required him to either pick up or deliver equipment at a dock. Some of the docks where claimant picked up or delivered equipment were well-equipped with cranes and laborers called "roustabouts" to load and unload. However, claimant was expected to assist in the loading and unloading process at these well-equipped facilities as good will for the employer.

Ten to twenty percent of the docks had no loading or unloading equipment or personnel. At such docks, claimant did all of the work of loading and unloading the equipment by himself. Claimant testified in a deposition that, in his estimate, he had a delivery or a pick-up two or three times a week at a poorly equipped dock where he had to do the loading or unloading himself. Deposition, at 40.

When claimant picked up or delivered equipment at a dock for use in offshore drilling, every effort would be made to coordinate the arrival of the barge at the dock with the arrival of claimant and his truck. This was done to save the time and money necessary to operate a crane or pay personnel to move the equipment. When claimant picked up or delivered equipment at an unequipped facility his truck would also meet the barge. Claimant would use either a winch which was on his truck, or a device known as a "gent pole" which he also carried on his truck, to load or unload the equipment at such a dock. Claimant would drive his truck up to the barge and would board the barge himself to secure or release cables on the cargo.

On the day of the injury, claimant was assigned to pick up several small boats used in oil and gas drilling operations. These boats were to be picked up at an unequipped dock facility. When claimant arrived at the dock with his truck, the boats were tied up at the water's edge. The dock was, in reality, a gravel and shell-covered slope or landing which led down into the water. Claimant backed his trailer to the water's edge, and ran his winch line from the back of his cab along the trailer bed and tied it to the front of the first boat. He then winched the boat out of the water and onto his trailer. He loaded the second boat in the same manner. When he attempted to load the third boat, which was made of steel and much heavier than the first two, he had some difficulty. Several other men who were in the vicinity voluntarily assisted claimant in his attempt to

load this boat. While they tried to lift the back end of the boat so that it could be pushed over the tail board of claimant's truck, the boat slipped, and fell on the claimant. Claimant sustained a crushed pelvis, and urological injuries.

The administrative law judge recognized that during a relatively small part of his working time, claimant performed some of the duties of a "roustabout" with respect to the loading and unloading of the equipment and materials he transported. However, the administrative law judge went on to note that the equipment and materials which claimant handled were used in drilling for oil and gas offshore and on land. She concluded that claimant never handled commercial goods and commodities which were transported in trade or commercial vessels. She then cited the definition of maritime employment announced by the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), that a claimant's work must have a "realistically significant relationship to traditional activity involving navigation and commerce on navigable waters,"[1] as well as two decisions by the Board which have held that "roustabouts" working on fixed oilwell platforms are not covered by the Act. *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (1977); *Toups v.*

1 That court also stated that, in order to be covered, an employee's work must have a realistic relationship to the traditional work and duties of a ship's service employment. *Weyerhaeuser, supra.*

Chevron Oil Co., 7 BRBS 261, BRB No. 76-453 (1977). Accordingly, the administrative law judge concluded that claimant's primary duties as a truck driver and his "roustabout" duties loading and unloading oil and gas drilling equipment, were not "maritime employment" in the traditional sense. Decision and Order, *slip op.* at 5, 6. Accordingly, the administrative law judge denied the claim.

This Board, in *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB Nos. 77-896, *et al* (Nov. 30, 1978), *rev'd sub nom., Fusco v. Perini North River Associates*, Nos. 79-4006, *et al*, 10 BRBS 624 (2d Cir. June 29, 1979),[2] rejected in part the definition of maritime employment promulgated in *Weyerhaeuser, supra*, because of a more recent decision by the Supreme Court. *Northeast Marine Terminals v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977) (hereinafter, *Caputo*). In that case, the Supreme Court noted that one purpose which Congress had in mind when it enacted the 1972 amendments to the Longshore Act was to adapt the Act to modern cargo handling techniques. Accordingly, we rejected the re-

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2 In *Sedmak, supra*, the Board concluded that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters," for a claimant to meet the status test under Section 2(3).

The U.S. Court of Appeals for the Second Circuit in reversing the Board's denial of coverage in *Sedmak, supra*, concluded that anyone whose "major" or "principle" duties are performed over actual navigable waters is a maritime employee. We have declined to follow *Fusco*, and continue to apply the definition of maritime employment first announced in our *Sedmak* decision. *Pruner v. Ferma Corp.*, ____ BRBS ____, BRB No. 78-523 (Aug. 15, 1979).

quirement set forth in *Weyerhaeuser* that an employment must be "traditionally" maritime in order to meet the definition of the Act.

In light of the foregoing analysis, we must conclude that the administrative law judge's reliance on *Anderson, supra,* and *Toups, supra,* was misplaced. Those cases involved injuries to workers in the oil and gas industry whose duties were primarily involved with operating and repairing the pumping equipment on fixed oilwell platforms. The Board held that the claimants in those cases were not covered because their duties were related to the production of oil and gas and not to a maritime industry. In each of those cases, this Board concluded that the only connection which the claimants had to maritime concerns was the fact that they were injured on platforms which, although affixed permanently to the bottom, were located offshore in navigable waters.

Claimant, in the instant case, was engaged in transportation including loading and unloading functions, not the operation or repair of pumping equipment. Therefore, we do not consider *Anderson* and *Toups* to be controlling.

The record demonstrates that the majority of claimant's working time was spent driving his truck. The record does not show exactly how much of his time claimant usually would spend loading or unloading his cargo, but only half of his runs involved a pickup or de-

livery from a barge at a dock. Ten to twenty percent of claimant's dock runs were to unequipped docks where claimant did more than merely secure his load and guide it on or off the bed of his truck. At these docks, claimant had to load or unload the cargo completely by himself. At such times, claimant went aboard the barges. In a deposition, claimant testified that two or three times a week he was required to board a barge and load or unload cargo by himself. Deposition, at 40.

Summarizing this evidence, it is apparent that only five to ten percent of claimant's runs required him personally to load or unload cargo from a barge onto his truck. Most of his work time was spent driving his truck, not loading or unloading. Even if I assume that half of claimant's time was spent loading and unloading his truck, rather than driving, then only two and one half to five percent of his overall work time was spent loading or unloading cargo at unequipped dock facilities where he had to board vessels.

Accordingly, the single issue in this case is whether a claimant who is injured while performing an arguably maritime function, but the vast majority of whose work is not maritime in nature, is entitled to coverage under the Act. Stated another way, the question is whether the task claimant performs at the "moment of injury" can confer coverage.

In *Caputo, supra*, the Supreme Court stated that Section 2(3) of the Act was enacted by Congress to focus

on occupations such as longshoreman, harbor worker, ship repairman, ship builder, and ship breaker. That section of the Act was intended to provide continuous coverage to these amphibious workers throughout their employment. *Caputo*, at 272-273. The Supreme Court rejected the "moment of injury" test which evaluates an employee's status only in terms of the employee's "particular task at the moment of injury." *Caputo*, at 274. *See also Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

The Supreme Court has announced that the status test precludes a focus on an employee's particular activity at the time of injury in order to deny coverage. *Caputo*, at 271-73. It follows that the status test should not allow a focus on an employee's particular and isolated activity at the time of injury in order to confer status.

Moreover, the Board has also viewed the employee's overall activities or duties in order to determine status under Section 2(3). *See Brown v. Reynolds Shipyard*, 9 BRBS 614, BRB No. 77-286 (Jan. 24, 1979); *McNeil v. Prolerized New England Company*, 8 BRBS 1, BRB Nos. 77-328 & 77-328A (March 20, 1978); *Mildenberger v. Cargill, Inc.*, 2 BRBS 51, BRB No. 74-224 (July 3, 1975).

Accordingly, we conclude that a substantial portion of an employee's duties should be maritime in nature in

order for him to meet the status test. Otherwise, coverage would be granted based on the improper "moment of injury" test. *See Howard v. Rebel Well Service,* ____ BRBS ____, BRB No. 78-502 (Dec. 7, 1979).

Claimant carried out an arguably maritime function no more than five percent of his work time. His primary duty was truck driving, a function that does not exhibit a significant relationship to maritime activity. *Sedmak, supra.* We conclude that claimant did not engage in a maritime function for a substantial portion of his time. Therefore, we hold that he is not entitled to coverage under the Act. *See Cappelluti v. Sea-Land Service, Inc.,* 10 BRBS 1024, BRB No. 78-580A (Aug. 31, 1979); *Hebert v. Main Iron Works, Inc.,* 10 BRBS 717, BRB No. 78-544 (May 31, 1979).

Indeed, it is questionable whether claimant was even performing a maritime activity at the time of injury. In *Caputo, supra,* the Supreme Court expressly stated that workers who unload cargo and transport it to a storage area away from the ship's side are covered, while employees, such as truck drivers, who pick up stored cargo for further trans-shipment are not. *Caputo,* at 266-67, n.27. Claimant's activities were similar to these non-covered activities.[3]

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3 In *Nelson v. Warren Bros.,* 7 BRBS 627, BRB No. 76-414A (Jan. 24, 1978), we held that a truck driver was engaged in maritime employment. We arrived at this conclusion because Nelson drove his truck from a barge loading float to a storage area near an asphalt manufacturing plant. The entire operation was part of a single business owned and operated entirely by Nelson's employ-

The U.S. Court of Appeals for the Fifth Circuit, the circuit wherein this case arose, has recently interpreted the Supreme Court's decision in *Caputo* as setting forth alternate tests for status. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3771 (May 29, 1979). According to the alternate tests in *Thibodaux*, a claimant will satisfy Section 2(3) if (1) he was engaged in maritime employment at the time of injury or (2) if his overall occupation was one covered by the Act.

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er at the waterside facility. We concluded that Nelson's function, although truck driving, corresponded with the example set forth in *Caputo, supra*, and, therefore, was maritime employment.

We have re-examined the facts in *Nelson*. We note that claimant had been assigned to internal plant transportation duty on the day of his injury, but for several days before that he had been transporting materials out of the waterside asphalt facility to other locations in the area. No specific finding was made in that case as to the nature of claimant's overall duties, or as to what portion of his time was regularly spent in transporting cargo from a barge to a storage area within employer's yard. It appears, however, that Nelson did not spend a substantial amount of his time trucking cargo from the barges to the holding area near the asphalt plant, and that he merely happened to have been assigned this duty on the day of his injury. The result arrived at in *Nelson* appears to conflict with the rule promulgated in the instant case that a claimant's maritime-related duties must constitute a substantial portion of his overall employment in order for him to qualify as a maritime employee. *Supra*, at 8. To the extent that *Nelson* conflicts with the law as announced in the instant case, we decline to follow it.

Claimant Boudloche transported leased oilfield equipment from a lessor's warehouse to a lessee's land or water-based drilling area. The equipment passed through several spheres of control. The warehouses and the barges were owned by different people and were many miles apart. In our view claimant Boudloche's duties as a truck driver were trans-shipment over land and were not maritime in nature.

While our line of reasoning is distinctly different from that expressed in *Thibodaux*,[4] it is my opinion that the result herein is the same as that which would be reached applying the *Thibodaux* analysis.

The first test is not met by the claimant in the instant case since, in my view, as previously noted, claimant was not engaged in a maritime activity at the time of his injury.

The alternate test in *Thibodaux* was described by that court as a test of occupation. The Court specifically noted that the status requirement is met if claimant spent "at least part of his time 'indisputably' as a longshoreman, harbor worker, shiprepairman or shipbreaker." *Thibodaux*, at 845. I am unable to conclude that a claimant who spends, at the absolute maximum, five percent of his work time in loading and unloading drilling equipment would be deemed by the Fifth Circuit as

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4 In *Thibodaux*, the court, in concluding that *Caputo* recognized alternate tests of status, appeared to rely in part on the discussion in Note, *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co. v. Caputo*, 64 Va. L. Rev. 99 (1978). It should be emphasized, however, that the note only "analyze[d] the status component of coverage as it applied to longshoring operations." [Footnote omitted.]. 64 Va. L. Rev. at 100. Indeed, the author of the note indicated that he was not attempting to deal with "the employee status" for maritime employment in general which includes, among others, ship repairman, shipbuilders, and shipbreakers. 64 Va. L. Rev. at 100, n. 13. I do not believe that this law review note, clearly limited to a discussion of one possible category of maritime employment, can be used as a basis for indicating the test to be applied for maritime employment in general.

having spent "at least part of his time 'indisputably' as a longshoreman," or to have the overall status of a maritime employee.[5]

I emphasize that the facts in this case are significantly different from those of *Caputo, supra.* Claimant, Caputo was a regular longshoreman and a part of a gang which was temporarily hired to load and unload containers, barges and trucks. He happened to be injured while assigned to loading a truck, although his work for the most part was of a general longshoring nature. Caputo was clearly covered for a great part of his work, and the Court determined that Congress intended he should be covered for all of it. On the other hand, Claimant Boudloche spent an overwhelming amount of time in land-based employment unrelated to maritime concerns. I do not consider that Congress intended to cover employees whose maritime employment is minimal.

For the reasons stated above, the Decision and Order of the Administrative Law Judge is affirmed.

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5 The Fifth Circuit did not focus on whether claimant's momentary or incidental maritime duties would render a worker's entire occupation "maritime employment."

The Second Circuit has also refrained from deciding "the eligibility of a person who performed merely incidental duties on navigable waters." *Fusco v. Perini North River Assoc.*, No. 79-4006, *slip op.* at 20, n. 17, 10 BRBS 624 (2d Cir. June 20, 1970).

SO ORDERED.

/s/ SAMUEL J. SMITH
SAMUEL J. SMITH
Chief Administrative
Appeals Judge

KALARIS, Administrative Appeals Judge, concurring:

I agree with Judge Smith's determination that, in order for a claimant to be covered by the Act, a substantial portion of his duties must be maritime in nature. I therefore agree with the result reached in this case. However, I do not join in Judge Smith's discussion of the issue whether claimant was performing maritime activity at the time of injury and the discussion of the decision of the United States Court of Appeals for the Fifth Circuit, *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir.) *cert. denied*, 47 U.S.L.W. 3771 (May 29, 1979).

/s/ ISMENE M. KALARIS
ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, dissenting:

The basic facts in this case are not in dispute. Claimant was severely injured while he and several others were attempting to remove a boat from the water and load it onto his truck. The administrative law judge

found that claimant was still totally disabled as a result of that injury at the time of the hearing below.

Nonetheless, the majority finds that claimant was properly denied benefits under the Act. Their rationale, however, differs from that adopted by the administrative law judge which they expressly repudiate. Both members of the majority agree that claimant must be denied the benefits of the Act because their analysis of his work history fails to reveal that "a substantial portion" of his duties were maritime in nature. Judge Smith would also hold that "claimant was not engaged in a maritime activity at the time of his injury"; Judge Kalaris finds it unnecessary to reach this issue.

In reaching this result, the lead opinion declines to follow the law as established by the Courts of Appeals of three Circuits (the Ninth, the Second and the Fifth, where the injury occurred) and also appears to overrule one of our prior decisions, *Nelson v. Warren Brothers*, 7 BRBS 627, BRB No. 76-414A (Jan. 24, 1978), now pending on appeal in the Sixth Circuit. The concurrence apparently joins in all of this process of reasoning except the critique of the Fifth Circuit's decision in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3771 (May 29, 1979).

The administrative law judge made the following findings of fact and conclusions of law concerning

claimant's normal work duties and the circumstances of his injury:

> At least 50% of Claimant's pick-up and deliveries were to and from a dock. Whenever he went to a dock area it was to pick up or deliver cargo that had come off of or was destined to be loaded onto a barge or other vessel.

Decision and Order, p. 2.

> Most of the time Claimant drove a large 18-wheeler truck with a float and hauled heavy oil-field equipment. Most of the dock facilities he went to had the necessary equipment and personnel (roustabouts) to load or unload equipment from the truck to the barge or off the barge onto the truck float. Even when making a delivery at one of these well-equipped facilities Claimant was required to unsecure the equipment on his truck and help the crane operator hook the crane slings or cables to the equipment to be hoisted from the truck to a barge. These activities were part of his routine normal duties. Furthermore, the drivers are generally expected to give whatever assistance they can in the loading and unloading operations as a matter of good will for Howard Trucking. When cargo was being hoisted by crane off a barge onto the truck

Claimant was required to position his truck and signal the crane operator where to lower the cargo onto the truck.

Depending on what was being delivered to a dock facility, Claimant sometimes (but not frequently) drove his truck onto a barge which was towed out to off-shore rigs and platforms. He would have to secure his truck-trailer to the barge by chaining it down. Claimant would then be required to help unload the equipment or materials from his truck to the rig or platform.

In short, it was part of Claimant's job to help load or off-load the equipment and materials he hauled.

Between 10% and 20% of the docks Claimant went to had no loading or unloading equipment or personnel. At those dock areas the driver is expected to load or unload his cargo the best way he can — sometimes without any assistance at all. In such instances he had to go aboard the barge to hook up his winch lines to the equipment and materials on the barge. Claimant estimated that 2-3 times a week he had to load or unload cargo without assistance from anyone.

On the day he was injured (February 5, 1975) Claimant had been dispatched to the Conoco Dock at Belle River to pick up two pull boats and two skiffs and take them to Arc Welding at Thibodeaux, Louisiana. His truck was equipped with a flatbed trailer (also called a float) and a winch. A barge had brought the boats to the dock which was in reality a gravel-shell road leading out of the water. When Claimant arrived the boats were afloat and tied up to keep them from drifting. Claimant backed his truck-trailer to about two feet from the water. He ran his winch line from the back of his cab across the tail board and tied it to the front of the boat. He then went back to his truck and winched the boat out of the water and onto the float. He did the same thing with a second boat. He had some difficulty with the third boat (which was made of steel and weighed about 500 pounds) because there was not enough room left on the float. Therefore, with the help of five other men he was involved in lifting the back end of the boat so it could be pushed over the rolling tail board when the boat slipped. The boat fell on claimant.

Decision and Order, pp. 3 and 4.

It has been established to my satisfaction that *Claimant's duties* as a truck driver for

> Howard Trucking *involved* not only hauling equipment and materials but also *loading and unloading* such *items directly from his truck to vessels or directly from vessels to his truck*, often times without assistance. Even in those instances where heavy-duty equipment and roustabout crews were available to do the great bulk of the work, Claimant at least helped in the loading and unloading process. Thus, during the relatively small amount of work time Claimant spent at a dock site *he performed some of the duties of a roustabout with respect to the equipment and materials he picked up or delivered to and from those areas.*

Decision and Order, p. 5. (emphasis added.)

Upon the facts of this case, I find it incredible that there can be any question whether claimant was engaged in maritime employment at the time of his injury. His pelvis was crushed by an 500 pound steel boat which he was engaged in lifting out of the water and onto his truck which was parked two feet from the water's edge at the Conoco Dock at Belle River. Claimant was no volunteer or innocent bystander; he was engaged in a part of his normal duties for the employer which the administrative law judge found included "loading and unloading . . . items directly from his truck to vessels or directly from vessels to his truck." Surely, it can not be argued that claimant's employment was rendered less maritime in character because

at the time of injury he was loading a boat rather than some more traditional form of cargo!

The majority grounds their denial of benefits upon their finding that "a claimant's maritime-related duties must constitute a substantial portion of his overall employment." The lead opinion would make a finding of fact that "no more than five percent of [claimant's] work time" was spent in even "arguably maritime function[s]." The administrative law judge made no such finding of fact and this Board is not empowered to draw such conclusions on appeal. 33 U.S.C. §921(b)(3).

What my colleagues would have this Board do would be to establish a *de minimis* rule that would have to be considered in the event an employee's activity in maritime employment is limited in time. However, in attempting to apply such a rule, they fail to set forth what they would consider to be more than a *de minimis* amount of time in such activity or as they would put it, a substantial part of this employment. This Board has rejected applying a *de minimis* rule under the pre-1972 Act when applied to occupational diseases resulting part from activity over navigable waters. *See Fulks v. Avondale Shipyards, Inc.*, 541 F.2d 279 (mem.), 5 BRBS 390 (5th Cir. 1976), *rev'g and remanding* 3 BRBS 415, BRB No. 75-269 (April 16, 1976) (welding fumes exposure). *See* 5 BRBS 392.1 and 10 BRBS 340, BRB Nos. 78-369A and 78-369B (March 30, 1979), *appeal docketed*, No. 79-1861 (5th Cir. April 11, 1979) for the subsequent history of the case.

Contrary to my colleagues' interpretations of the law, the decisions in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), and *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3771 (May 29, 1979), do not reject a "moment of injury" test for coverage under the Act. Although it is clear that the Supreme Court in *Caputo* construed the Act to mean that a worker who is normally within the coverage of the Act does not lose his protection just because some portion of his duties may not be "indisputably maritime" in character, the converse of this proposition does not follow from it.

The United States Court of Appeals for the Fifth Circuit recently interpreted the Supreme Court's decision in *Caputo* as setting forth alternate tests for status. According to the alternate tests in *Thibodaux*, a claimant will satisfy Section 2(3) if (1) he was engaged in maritime employment at the time of injury or (2) if his overall occupation was one covered by the Act.

That there is no "substantial portion of duties" test and that injury while engaged in maritime employment is a sufficient basis for coverage under the Act were both made abundantly clear in the Supreme Court's unanimous decision in *P. C. Pfeiffer Co., Inc. v. Ford*, 48 U.S.L.W. 4018 (Nov. 27, 1979). The Court in *Ford* found that the word "including" as used in Section 2(3) of the Act, 33 U.S.C. §902(3), is to be construed to mean that all itemized occupations specified in that

subsection "comprise a part of the larger group of activities that make up 'maritime employment.'" 48 U.S.L.W. at 4020 n.7. It is indisputable that claimant was engaged in "loading" at the time of his injury. "Loading and unloading" are the essential elements of "longshoring operations." I would hold that claimant was an "other person engaged in longshoring operations" at the time of his injury who thus comes within the express terms of Section 2(3) of the Act as construed by the Supreme Court. In *Ford*, the Court expressly affirmed the decision of the Court of Appeals for the Fifth Circuit that the claimants were entitled to benefits under the Act "[b]ecause the Court of Appeals correctly determined that Ford and Bryant were engaged in maritime employment *at the time of their injuries*, ..." 48 U.S.L.W. at 4021 n.18 and 4022. [emphasis added].

The fact that claimant was a truck driver who rarely set foot on pre-amendment navigable waters is no more dispositive of his status under the Act than were the facts that claimants Ford's (a warehouseman) and Bryant's (a cotton header) duties never required them to work over water. What the Court found to be dispositive was the nature of their work at the time of injury. It found, "Both men engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation. . . . Thus, there is no principled basis for distinguishing Ford and Bryant from longshoremen who have been injured while performing the same tasks." 48 U.S.L.W. at 4021.

Clearly, truck drivers are not normally covered under the Act while driving their trucks, even on a covered situs. *See* 48 U.S.L.W. at 4021. However, when a truck driver becomes a longshoreman by assuming a longshoreman's duties, he submits himself to the same risks and is entitled to the same protections against injury and disability.

The necessity for such an approach is illustrated by the following example. If the steel boat which claimant was loading onto the truck had fallen so as to injure both himself and one of the roustabouts who was assisting in loading it and we were to hold the roustabout covered under the Act, but deny its benefits to the driver, we would be reviving the worst of the absurd and fortuitous results which prevailed prior to the 1972 amendments. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969) (state or federal coverage dependent upon whether the injured worker's body fell on the pier or in the water).

Thus, in reliance upon the holdings in *Fulks, Caputo, Thibodaux* and *Ford*, I would find that claimant meets the status requirements of the Act and remand the case to the administrative law judge for the further necessary findings of fact and law required for a full adjudication of this claim.

/s/ JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

Dated this 11th day
of December 1979.

APPENDIX C

EDGAR J. BOUDLOCHE,
Petitioner,

versus

HOWARD TRUCKING CO., INC.,
NORTHWEST INSURANCE CO. AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Respondents.

No. 80-3045.

United States Court of Appeals,
Fifth Circuit.
Unit A

Dec. 19, 1980.

Petition for Review of an Order of the Benefits Review Board.

Before COLEMAN, Chief Judge, CHARLES CLARK and REAVLEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

A majority of the Benefits Review Board asserts that Congress did not intend for the Longshoremen's and Harbor Workers' Compensation Act (Act) to cover employees whose maritime employment was insubstantial. Because the Supreme Court has held Congress intended to cover workers when at least some part of their duties involved such employment, we reverse and remand.

The facts as found by the Board are as follows. The claimant, Edgar J. Boudloche, was employed by Howard Trucking Company, Inc., (Howard) as a truck driver. Howard was engaged in the business of transporting oil field and marine equipment used in drilling for oil and gas offshore and on land. Boudloche hauled heavy oil field equipment on a large truck and a flatbed trailer rig. Approximately half of his runs were from one land-based site to another. The other half required him to either pick up or deliver equipment at a dock. Ten to twenty percent of the docks worked by Boudloche had no loading or unloading equipment or personnel. At such docks Boudloche did all the work of loading and unloading the equipment by himself. The remaining docks where Boudloche picked up or delivered equipment were equipped with cranes and laborers called "roustabouts" to load and unload. To develop good will for his employer, Boudloche was expected to assist in the loading and unloading process even at those well-equipped facilities. Boudloche estimated that he had a

delivery or a pick-up two or three times a week at a poorly equipped dock where he had to do the loading or unloading himself.

Boudloche would use either a winch or a gin pole on his truck to load or unload at unequipped docks. This required that he board the barge being loaded or unloaded to secure or release cables on the cargo. Only 2½ to 5 percent of his overall work time was spent loading or unloading cargo at unequipped dock facilities where he had to board vessels.

On the day of his injury, Boudloche was assigned to pick up several small boats used in oil and gas drilling operations. These boats were to be picked up at an unequipped dock facility. When he arrived at the dock with his truck, the boats were tied up at the water's edge. The dock was no more than a gravel and shell-covered slope leading down into the water. Boudloche backed his trailer to the water's edge and ran his winch line from the back of his cab along the trailer bed and tied it to the front of the first boat. He then winched the boat out of the water and onto his trailer. He loaded two boats in this manner. When he attempted to load the third boat, which was made of steel and much heavier than the first two, the boat slipped and fell on the claimant. Boudloche sustained a crushed pelvis and urological injuries.

Since Boudloche was at a dock at the water's edge when he was injured, he was within the Act's water-

front situs provision. 33 U.S.C. §902(4). The single issue is whether a claimant who regularly performs indisputably maritime operations, but which maritime operations constitute only a small portion of his overall working time, occupies a status covered by the Act.

Section 2(3) of the Act provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, ...

33 U.S.C. §902(3). The Board determined that the Act required *a substantial portion* of the employee's duties be in longshoring operations to be covered. They concluded that because Boudloche spent only 2½ to 5 percent of his overall working time performing the full maritime function of a longshoreman, he did not meet their "substantial portion" of duties requirement.

In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), the Supreme Court held the Act's status requirement was met by a terminal laborer who sometimes worked at shore-based jobs and at other times performed a longshoreman's function. They defined longshoremen as "persons whose employment is such that they spend at least

some of their time in indisputably longshoring operations %y(4)" 432 U.S. at 273, 97 S.Ct. at 2362. Two years later, in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the Court held status coverage extended to two land-based workers who handled ships' cargo only after it had come to rest following discharge. Determining that both men were engaged in the type of duties that longshoremen perform — moving cargo between ships and land transports — the Court decided that coverage under the Act was to be determined by what workers were required to do and not in terms of when or where they were required to do work. "A worker responsible for some portion of that [longshoring] activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." 44 U.S. at 81, 100 S.Ct. at 337, 62 L.Ed.2d at 236.

Thus, the Court has looked at a worker who is required to perform a longshoreman's work a part of the time and to perform nonmaritime tasks the remainder of the time, and at workers whose total duties consisted of performing only a land-based portion of a longshoreman's job. In *Caputo* the Act's coverage was defined in terms of a worker spending "at least some" of his time in longshoring operations. In *Ford* the Court held that workers who performed "some" portion of the loading or unloading of a ship were covered. By these constructions the Court sought to effectuate congressional intent to expand coverage to a simple uniform standard which did not shift with an employ-

er's momentary whim. By substituting its "substantial portion" language for the Court's "some" in the coverage definition, the Board has departed from the letter and the spirit of the High Court's rule. This, of course, it cannot do.

Boudloche was directed to regularly perform *some* portion of what was indisputably longshoring work at fully equipped docks and, for at least *some* part of his work, was required to perform the total maritime job at unequipped docks. The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make Boudloche a maritime employee under the Act.

Our decision does not undertake to define the point at which a worker's employment in maritime activity becomes so momentary or episodic it will not suffice to confer status. That point clearly was not reached here. The decision appealed from is reversed and the cause is remanded to the Board for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC.
AND NORTH-WEST INSURANCE COMPANY,
Petitioners,

versus

EDGAR J. BOUDLOCHE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq. as amended in 1972, affords coverage to a truck driver who spends some of his time performing longshoring operations; i.e., loading cargo directly to barges from his truck and vice-versa and sustains injury while so engaged.

LIST OF PARTIES, PARENT AND SUBSIDIARY COMPANIES

1. Edgar J. Boudloche.
2. Howard Trucking Company, Inc.
   A) Howard Construction Company, Subsidiary or related company.
3. Mid-Continent Underwriters, Inc.
4. North-West Insurance Company.
5. United States Department of Labor.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties, Parent & Subsidiary Companies i

Statement of the Case 1

Argument 2

Petitioner's Authorities Distinguished 3

Conclusion 8

Certificate 9

TABLE OF AUTHORITIES

Cases:

Maher Terminals, Inc. v. Farrell, 548 F.2d 476 (3rd Cir., 1977) 3,5

Northeast Marine Terminal Company v. Caputo, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977) 2,5,6

Odom Construction Company v. United States Department of Labor, 622 F.2d 110 (5th Cir., 1980) 8

P. C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) 2,6

Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs, 540 F.2d 629 (3rd Cir., 1976) 3,4

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TABLE OF AUTHORITIES (Continued)

Page

Weyerhaeuser Company v. Gilmore, 528 F.2d 957 (9th Cir., 1975), cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976) 3,4

White v. Newport News Shipbuilding and Dry Dock Company, 633 F.2d 1070 (4th Cir., 1980) 3,5

Other Authorities:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq., as amended in 1972 ..... i,3,4,8

No. 80-1563

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC.
AND NORTH-WEST INSURANCE COMPANY,
Petitioners,

versus

EDGAR J. BOUDLOCHE AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Edgar J. Boudloche, hereafter respondent or simply Boudloche, suffered injury in a covered situs while

actually engaged in a longshoring operation i.e., unloading a vessel, as required by his employer, petitioner herein. Further, petitioner does not dispute the fact that Boudloche was required as part and parcel of his employment with petitioner to engage in maritime employment, primarily loading and unloading, at least some of the time.

Boudloche agrees and adopts the balance of petitioner's statement of the case. However, respondent disagrees that a Writ of Certiorari should be granted for the reason that there is no real conflict among the various circuits and the decision entered by the Fifth Circuit is not contrary to the decision entered by the Supreme Court.

> "The decision of the Fifth Circuit Court of Appeals is contrary to the intent of Congress and the decisions of the United States Supreme Court in *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), and *P. C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979).

ARGUMENT

Petitioner, Howard Trucking Company, Inc., employed Boudloche and classified him broadly as a truck driver. Admittedly, substantial amounts of Boud-

loche's time was spent in truck driving and truck driving related activities. As a condition of Boudloche's employment, petitioner required that Boudloche regularly perform indisputably maritime operations, i.e., loading and unloading vessels, at least some of the time. These maritime functions were discharged at the water's edge, which all parties agree brings Boudloche within the situs provision of the LHWCA. Boudloche suffered injuries while unloading a vessel at a covered situs, namely a dock area. Accordingly, Boudloche comes within the protection of the LHWCA since he was injured while engaged in maritime employment at a covered situs in furtherance of his employment.

PETITIONER'S AUTHORITIES DISTINGUISHED

Conflict Among Circuits

Petitioner relies on *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir., 1975) cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976), *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir., 1976), *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir., 1977) and *White v. Newport News Shipbuilding and Dry Dock Company*, 633 F.2d 1070 (4th Cir., 1980) to argue that the decision in Boudloche, the instant case, creates a conflict within the various circuits, presumably with regard to what the correct test should be in determining who is entitled to the benefits of the LHWCA. All four cases cited by petitioner

concerning a conflict can be readily reconciled with and/or distinguished from this case.

In *Weyerhaeuser*, the Court held that to be covered under the LHWCA, as amended in 1972, an employee at the time of his injury "be engaged in maritime employment." The claimant in that case did not have any duties involving the receipt of cargo logs at docks, moving logs into the mill for debarking or loading ships or operating the equipment that moved the logs from navigation to the mill or from the mill, as a finished product, back into navigation. The Court further found that a log pond was not in fact a part of the maritime navigation system. Boudloche though was involved in unloading and was in an area customarily so utilized.

In *Sea-Land*, a truck driver overturned a truck but not on a covered situs. The case actually held that where an employer was engaged in shipping and in motor freight operations, one must determine the specific function of the employee at the time of injury. Boudloche, beyond any doubt, suffered injury on a covered situs. Further, he was engaged in a longshoring operation, unloading a vessel, at the express request of his employer who had elected to engage not only in motor freight operations but also in traditional maritime employment, i.e., longshoring operations. Thus, Boudloche met a situs as well as a maritime function.

In *Maher,* a clerk suffered injury. This clerk was found to be purely a clerk. His job did not require him to participate in the loading or unloading of cargo. Boudloche, while called a truck driver, was required to load and unload at least some of the time and was in fact injured while engaged in an unloading operation. The injured worker was classified as a clerk by union contract. Boudloche may well be classified broadly as a truck driver. However, the 4th Circuit held that the critical question was whether an employee was engaged in maritime employment. In *White,* the Court found that the employee's regular functions were an integral part of shipbuilding. Similarly, Boudloche's functions were an integral part of the loading/unloading operation at least some of the time.

Contrary To Supreme Court Holdings

The 5th Circuit correctly reconciled the case at bar with the Supreme Court's prior decisions.

> "In *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), the Supreme Court held the Act's status requirement was met by a terminal laborer who sometimes worked at shore-based jobs and at other times performed a longshoreman's function. They defined longshoremen as 'persons whose employment is such that they spend at least some of their time in indisputably longshoring operations

%y(4)' 432 U.S. at 273, 97 S.Ct. at 2362. Two years later, in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the Court held status coverage extended to two land-based workers who handled ships' cargo only after it had come to rest following discharge. Determining that both men were engaged in the type of duties that longshoremen perform — moving cargo between ships and land transports — the Court decided that coverage under the Act was to be determined by what workers were required to do and not in terms of when or where they were required to do work. 'A worker responsible for some portion of that (longshoring) activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.' 444 U.S. at 81, 100 S.Ct. at 337, 62 L.Ed.2d at 236.

Thus, the Court has looked at a worker who is required to perform a longshoreman's work a part of the time and to perform nonmaritime tasks the remainder of the time, and at workers whose total duties consisted of performing only a land-based portion of a longshoremen's job. In *Caputo* the Act's coverage was defined in terms of a worker spending 'at least some' of his time in longshoring operations. In *Ford* the Court held that workers who performed 'some' portion of the loading or un-

loading of a ship were covered. By these constructions the Court sought to effectuate congressional intent to expand coverage to a simple uniform standard which did not shift with an employer's momentary whim. By substituting its 'substantial portion' language for the Court's 'some' in the coverage definition, the Board has departed from the letter and the spirit of the High Court's rule. This, of course, it cannot do.

Boudloche was directed to regularly perform some portion of what was indisputably longshoring work at fully equipped docks and, for at least some part of his work, was required to perform the total maritime job at unequipped docks. The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make Boudloche a maritime employee under the Act."

Congressional Intent

Petitioner states that Congress did not intend and specifically excludes truck drivers on a covered situs. However the Congressional note referred to truck drivers whose responsibility on the waterfront is to pick up or deliver cargo unloaded from or destined for marine transportation and would not be covered. Obviously, Boudloche is not the type of truck driver referred to in the Congressional note in that Boudloche is

required to actively participate in placing cargo into navigation or withdrawing same from it. Boudloche respectfully refers this Court to *Odom Construction Company v. United States Department of Labor*, 622 F.2d 110 (5th Cir., 1980) wherein the 5th Circuit stated that the fact that an employed worker spent a great majority of his time on indisputably land based jobs did not preclude coverage under LHWCA wherein he was doing maritime work at the time of his injury and a significant part, twenty percent, of the employer's overall work was maritime in nature.

CONCLUSION

The 5th Circuit addressed the specific coverage issue of whether or not a truck driver injured while engaged in longshoring activity at a covered situs came under the protection of LHWCA and found that he did. Whether or not he would be covered if not engaged in longshoring activity did not have to be addressed to resolve the issue. If petitioner did not desire to have its employees covered under this fact situation there petitioner simply should not require employees to engage in longshoring activities some of the time. Accordingly, petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been forwarded to opposing counsel, to-wit:

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This the ____ day of May, 1981.

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Office-Supreme Court, U.S.
FILED
MAY 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1563

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC., AND
NORTH-WEST INSURANCE CO., PETITIONERS

v.

EDGAR J. BOUDLOCHE AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a truck driver who regularly spends some of his working time performing longshoring operations and who was injured at the water's edge while loading small boats onto his truck was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Baltimore & Philadelphia Steamboat Co. v. *Norton*, 284 U.S. 408 9

Dravo Corp. v. *Banks*, 567 F. 2d 593 6

Dravo Corp. v. *OSHRC*, 613 F. 2d 1227 6

Fusco v. *Perini North River Associates*, 622 F. 2d 1111, cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981) 11, 12

Garvey Grain Co. v. *Director, OWCP*, 639 F. 2d 366 7

Maher Terminals, Inc. v. *Farrell*, 548 F. 2d 476 6

Newport News Shipbuilding & Dry Dock Co. v. *Graham*, 573 F. 2d 167 6

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... 4-5, 6, 8-9, 10, 11, 12

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 ..... 5, 6, 9, 10, 11, 12

Sea-Land Service, Inc. v. *Director, OWCP*, 540 F. 2d 629 ..... 10, 11

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Page

Cases—(Continued):

Thibodaux v. *Atlantic Richfield Co.*, 580 F. 2d 841, cert. denied, 442 U.S. 909 ..... 4, 7

Voris v. *Eikel*, 346 U.S. 328 9

Warren Brothers, Inc. v. *Nelson*, 635 F. 2d 552 11

Weyerhaeuser Co. v. *Gilmore*, 528 F. 2d 957, cert. denied, 429 U.S. 868 ..... 11, 12

White v. *Newport News Shipbuilding & Dry Dock Co.*, 633 F. 2d 1070 6

Statute:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* 3

Section 2(3), 33 U.S.C. 902(3) 3, 4, 5, 7, 8, 9, 10
Section 3(a), 33 U.S.C. 903(a) 8
Section 21(b), 33 U.S.C. (& Supp. III) 921(b) 4
Section 21(c), 33 U.S.C. 921(c) 5

Miscellaneous:

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972) 5, 10

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 5, 10

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1563

HOWARD TRUCKING COMPANY, INC., AND
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v.

EDGAR J. BOUDLOCHE AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-39a) is reported at 632 F. 2d 1346. The opinion of the Benefits Review Board (Pet. App. 11a-33a) is reported at 11 B.R.B.S. 687. The decision of the administrative law judge (Pet. App. 1a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1980. The petition for a writ of certiorari was filed on March 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Howard Trucking Company, Inc. is engaged in the business of transporting oilfield and marine equipment used in drilling for oil and gas offshore and on land (Pet. App. 3a, 13a, 35a). Respondent Edgar Boudloche was employed by Howard Trucking as a truck driver. Boudloche drove a large rig with a flatbed trailer equipped with a winch. At least 50% of his runs required him to pick up or deliver equipment at a dock. The remainder of his time was spent hauling heavy oilfield equipment from one land-based site to another (*ibid.*).

At approximately 10% to 20% of the docks to which Boudloche was sent, no loading or unloading equipment or personnel were available, and therefore Boudloche did the loading and unloading work by himself (Pet. App. 5a, 13a, 35a). When assigned to pick up equipment, he had to board a barge, hook up his winch lines to the cargo, and hoist it onto the flatbed trailer. When delivering equipment or materials, he had to load the items onto a barge and secure the cargo on board. Boudloche estimated that two or three times a week he had to load or unload cargo without assistance from anyone (*id.* at 5a, 13a).

At the remaining docks where Boudloche picked up or delivered equipment, laborers and cranes were usually available to move equipment between the truck and the barge. Even at these locations, however, Boudloche was expected to assist in the loading and unloading process, in order to develop good will for his employer (Pet. App. 4a, 13a, 35a). On rare occasions, he had to drive his truck onto a barge and secure the trailer to the barge. The barge would then be towed out to offshore drilling platforms where Boudloche would be required to help unload equipment or materials from the trailer to the platform (*id.* at 4a).

On February 5, 1975, Boudloche was sent to the Conoco dock at Belle River, Louisiana, to pick up several small boats used in oil and gas drilling operations. A barge had brought the boats to the dock. Boudloche found them there afloat and tied to keep them from drifting (Pet. App. 5a). The dock was an unequipped and unmanned facility that was nothing more than a gravel and shell-covered slope leading down into the water. Boudloche backed his truck to the water's edge and ran his winch line from the back of the cab along the trailer bed to the front of the first boat. He then winched the boat out of the water and onto the trailer. He loaded the second boat in the same manner. The third boat was substantially heavier than the first two. With the voluntary assistance of several men in the vicinity, Boudloche attempted to load the boat by lifting its back end so that it could be pushed over the rolling tailboard of the truck (*id.* at 5a-6a, 14a-15a). Boudloche was seriously injured when the boat slipped and fell on him. Since his injury, Boudloche has been unable to perform manual labor and has been instructed by his doctor not to lift more than 20 pounds (*id.* at 6a).

2. Respondent Boudloche sought compensation for temporary and continuing total disability under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Petitioners, Howard Trucking Company and its workers' compensation insurance carrier, contested the claim, asserting that at the time of his injury Boudloche was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act. Petitioners also disputed the nature and extent of Boudloche's disability (Pet. App. 2a, 12a). After a hearing, an administrative law judge found that Boudloche's duties on the job "involved not only hauling equipment and materials but also loading and unloading such items directly from his truck to vessels or directly from vessels to his truck, often times without assistance" (*id.* at 7a). Nevertheless, the

administrative law judge concluded that Boudloche was not "engaged in maritime employment" because the cargo he handled was used in drilling for oil and gas, and "[h]e never handled commercial goods and commodities which had been or were destined to be transported in vessels used in trade or commerce" (*id.* at 8a). The administrative law judge accordingly denied the claim for compensation without addressing the disability issue (*id.* at 9a-10a).

Respondent Boudloche appealed to the Benefits Review Board, in accordance with 33 U.S.C. (& Supp. III) 921(b). In a divided decision (Pet. App. 11a-33a), the Board affirmed the administrative law judge's decision and order but rejected her reasoning (*id.* at 17a). Chief Administrative Appeals Judge Smith took the view that, regardless of the nature of the work the employee was performing at the time of his injury, the "status" test of Section 2(3) is satisfied only if "a substantial portion" of the employee's overall duties is "maritime in nature" (*id.* at 19a-20a). According to the Chief Judge's calculations, no more than 5% of Boudloche's actual work time was spent loading or unloading cargo "at unequipped dock facilities where he had to board vessels" (*id.* at 18a). The Chief Judge considered this an insubstantial fraction of Boudloche's total activities on the job (*id.* at 20a).[1] Administrative Appeals Judge Kalaris concurred in

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[1]The Chief Judge admitted that, under the court of appeals' decision in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F. 2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), an employee may be covered under the Act *either* if he was engaged in maritime employment at the time of his injury *or* if his overall occupation is properly characterized as "maritime employment" within the meaning of Section 2(3). Without endorsing the alternative tests recognized in *Thibodaux*, the Chief Judge stated that the Board's result was "the same as that which would be reached by applying the *Thibodaux* analysis" (Pet. App. 22a). In the Chief Judge's view, respondent Boudloche "was not engaged in a maritime activity at the time of his injury" (*ibid.*). In support of this position, the Chief Judge cited a footnote in *Northeast Marine Terminal Co.* v.

this aspect of the Chief Judge's opinion.[2] Accordingly, the majority decided that, because no substantial portion of Boudloche's duties was maritime in nature, he was not engaged in maritime employment within the meaning of Section 2(3) (*id.* at 24a).

Administrative Appeals Judge Miller dissented (Pet. App. 24a-33a). He would have ruled that Boudloche satisfied Section 2(3)'s "status" test because he was engaged in longshoring operations, and therefore in maritime employment, at the time of his injury.

Respondent Boudloche sought judicial review of the Board's decision, under 33 U.S.C. 921(c). The court of appeals reversed, holding that Boudloche was a maritime employee within the meaning of the Act. Relying on *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), and *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 81 (1979), the court ruled that any employee who spends "at least some" of his time performing longshoring operations is engaged in maritime employment. In the court's view, the Board's requirement that in order to qualify as a maritime employee a "substantial portion" of one's duties must be maritime in nature is inconsistent with the opinions in *Caputo* and *Ford*. Accordingly, the court remanded the case to the Board for further proceedings concerning the nature and extent of Boudloche's disability.

Caputo, 432 U.S. 249, 266-267 n.27 (1977), where this Court reproduced the comments of the relevant congressional committees on the coverage of the Act as amended in 1972. The committee reports stated, in part, that "employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered * * *." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972). See pages 10-11 & note 7, *infra*.

[2]Judge Kalaris expressly declined to join that portion of the Chief Judge's opinion dealing with *Thibodaux* and the question whether Boudloche "was performing maritime activity at the time of injury" (Pet. App. 24a).

ARGUMENT

1. The decision of the court of appeals is correct and follows directly from this Court's statement in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend *at least some of their time* in indisputably longshoring operations, and who, without the 1972 Amendments, would be covered for only part of their activity" (emphasis added).[3] Respondent Boudloche unquestionably spends some of his time in performing longshoring operations, and, under *Caputo*, this is sufficient to establish his maritime employment. Although the Third Circuit has said that an employee's "primary duties" must be maritime in nature if he is to be considered "engaged in maritime employment" as a matter of occupation, the leading decision of this kind antedated *Caputo*,[4] and, more recently, the Third Circuit has acknowledged that, in light of *Caputo*, the "primary duties" test "may have reflected too narrow an interpretation" of the Act. *Dravo Corp.* v. *OSHRC*, 613 F. 2d 1227, 1233 n.9 (1980). Accordingly, we do not believe that the court of appeals' rationale in the present case conflicts with the governing law in any other circuit.[5]

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[3]See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979).

[4]See *Maher Terminals, Inc.* v. *Farrell*, 548 F. 2d 476 (3d Cir. 1977). See also *Dravo Corp.* v. *Banks*, 567 F. 2d 593 (3d Cir. 1977).

[5]*White* v. *Newport News Shipbuilding & Dry Dock Co.*, 633 F. 2d 1070 (4th Cir. 1980), which petitioners also cite in support of their allegation of a conflict among the circuits, entailed only an observation by the court that the employee's primary duties were maritime and that therefore the status test would be satisfied even under the approach followed by the Third Circuit in *Maher Terminals, Inc.* v. *Farrell, supra*. The court in *White* cited with approval its earlier decision in *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F. 2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), where it held that a maintenance man at a foundry was a maritime employee under the Act.

Moreover, completely apart from the question whether respondent Boudloche performed sufficient maritime tasks to be "engaged in maritime employment" throughout the working day, he was injured in the course of performing a task that was plainly maritime, and this fact alone is sufficient to satisfy the "status" test in Section 2(3). Indeed, it is difficult to understand why the Benefits Review Board and the court of appeals chose to decide this case by reference to the percentage of Boudloche's work that can properly be characterized as maritime. The critical point is that, notwithstanding Chief Judge Smith's remarks concerning truck drivers who merely pick up stored cargo for transshipment (Pet. App. 20a), the act of transferring cargo directly from water transportation to land transportation is quintessentially a maritime operation, even when it is performed by someone who spends most of his working hours driving a truck. As Judge Miller observed in his dissent from the Benefit Review Board's decision, "when a truck driver becomes a longshoreman by assuming a longshoreman's duties, he submits himself to the same risks and is entitled to the same protections against injury and disability" (*id.* at 33a). If an employee is injured in the performance of maritime work, it makes no difference whether his occupation, considered as a whole, qualifies as "maritime employment" within the meaning of Section 2(3). This is precisely what the Fifth Circuit recognized in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F. 2d 841, 844 (1978), cert. denied, 442 U.S. 909 (1979), when it referred to "the alternative tests of occupation and activity at the time of injury * * *." Here, respondent Boudloche was injured as he took cargo from

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even though approximately three-fourths of the foundry's work involved the production of non-maritime items. See also *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981) (worker is covered if he spends some of his time engaged in longshoring operations).

the water and attempted to load it onto his truck. Surely, as Judge Miller said (Pet. App. 29a-30a), this task is not rendered any less maritime in character because the cargo was itself a boat rather than goods or equipment.

Because the court of appeals' decision regarding the maritime nature of respondent Boudloche's employment is correct and does not conflict with the view of any other circuit, and because the result reached by the court of appeals is in any event justified by the nature of Boudloche's activity at the time of his injury, further review is not warranted. At the very least, because the court of appeals' decision does not finally dispose of the claim for benefits in this case, further review at this stage would be premature. Petitioners may raise their objections to the court of appeals' coverage ruling, together with any objections they may have to the decision on the nature and extent of respondent Bouldloche's disability, on review of any compensation order that may be entered on remand.

2. Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." 33 U.S.C. 902(3).[6] In *Northeast Marine*

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[6]In order to recover compensation under the Act for an injury in the course of employment, an employee must satisfy both the "status" test set forth in Section 2(3) and the "situs" test established by Section 3(a) of the Act, 33 U.S.C. 903(a). The latter provision, which is not at issue here, states that, in order to be compensable, an injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Accordingly, under the court of appeals' decision, an employee with duties similar to Boudloche's would be covered by the Act only if injured on a covered situs. He would be excluded from coverage during the bulk of his working day while driving on overland highways.

Terminal Co. v. *Caputo, supra*, 432 U.S. at 273, this Court held that workers who "spend at least some of their time in indisputably longshoring operations" qualify for "employee" status under Section 2(3). In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 81 (1979), the Court held that land-based employees who perform "some portion" of the overall longshoring process, described as the process of moving cargo between a vessel and land transportation, satisfy the status test.

Petitioners do not dispute that in the course of his regular duties, respondent Boudloche spent at least some time performing longshoring operations. According to the Benefits Review Board's estimate, Boudloche spent as much as 5% of his working time performing the maritime functions of a longshoreman, loading and unloading cargo at docks that did not have equipment or personnel to assist him in his task (Pet. App. 18a, 20a). In addition, in order to develop good will for his employer, Boudloche was required to assist in the loading and unloading process at the remaining, fully-equipped, docks (*id.* at 4a). In sum, as the court of appeals concluded, Boudloche "regularly perform[ed] *some* portion of what was indisputably longshoring work at fully equipped docks and, for at least *some* part of his work, was required to perform the total maritime job at unequipped docks" (*id.* at 39a). This aspect of Boudloche's job was sufficient to qualify him, by occupation, as a "person engaged in maritime employment" within the meaning of Section 2(3).

The court of appeals' refusal to add a "substantial portion" gloss to this Court's language in *Caputo* and *Ford* conforms to the fundamental principle that the Act should be liberally construed in furtherance of its remedial purpose. *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414

(1932). The court's construction also serves the congressional objective, recognized by this Court, to adopt a simple, uniform standard of coverage. As the court explained in *Ford* (444 U.S. at 83-84), "a definition of maritime employment that reaches any worker who moves cargo between ship and land transportation will enable both workers and employers to predict with reasonable assurance who on the situs is protected" by the Act.

3. Petitioners nevertheless contend that respondent Boudloche falls outside the Act's coverage because his principal duty was to drive a truck (Pet. 15). They assert that this Court has specifically excluded truck drivers from coverage under the statute.[7] They rely in particular on the following passage from this Court's opinion in *Caputo* (432 U.S. at 267):

> [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

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[7]Petitioners also state that the "lower courts and the Congressional Reports" specifically exclude truckers from coverage (Pet. 15). The committee reports on the 1972 amendments, however, do not mention truck drivers. They do state that persons engaged in the loading and unloading process are covered employees but that workers "whose responsibility is *only* to pick up *stored* cargo for further trans-shipment would not be covered * * *". S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972) (emphasis added). The sentence on which petitioners apparently rely thus does not support their submission that truck drivers may not be "employees" under Section 2(3), regardless of their role in loading and unloading vessels.

Petitioners cite (Pet. 14) only one case from the courts of appeals that refers to truck drivers. See *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F. 2d 629 (3d Cir. 1976). The Third Circuit's statement in that case

But this statement means only that the tasks ordinarily performed by truck drivers on a covered situs—picking up cargo that had previously been unloaded and stored for shipment on land, or delivering cargo for storage prior to marine shipment—do not by themselves constitute maritime employment. The Court did not suggest that any employee whose job title is "truck driver" or whose duties include driving a truck is *ipso facto* excluded from the Act's coverage. On the contrary, as discussed above, the Court held that the relevant question is whether the worker spends "at least some of [his] time" engaged in longshoring operations or other activity that qualifies as maritime employment. That test is plainly met here. Indeed, the Court in *Caputo* thought that "all would agree that persons bringing * * * cargo directly from a ship to a truck are engaged in maritime employment" (432 U.S. at 267 n.28). Accord, *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82.

4. Finally, petitioners also suggest (Pet. 12-14), without explanation, that the decision below conflicts with the decisions in *Fusco* v. *Ferini North River Associates*, 622 F. 2d 1111 (2d Cir. 1980), cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981), and *Weyerhaeuser Co.* v. *Gilmore*, 528 F. 2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). In those cases, the courts held that workers employed in the

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(540 F. 2d at 638) that the key to coverage is "the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing," obviously was not intended to exclude from the Act's coverage all employees who drive trucks. Indeed, *Sea-Land Service* itself involved a compensation claim filed by a worker who was injured while driving a truck on a public street. The court held that coverage turned on the precise connection between the driver's trip and water transport. The court therefore remanded to the Board for further findings on that issue. *Id.* at 639-640. See also *Warren Brothers, Inc.* v. *Nelson*, 635 F. 2d 552 (6th Cir. 1980) (truck driver covered).

construction of the foundation for a sewage treatment plant on a river and in moving logs on a saw mill pond were not engaged in maritime employment within the meaning of the Act, although their principal job duties were performed over actual navigable waters. The courts said that the work did not qualify as maritime employment because it did not bear a "significant relationship to navigation or to commerce on navigable waters" (622 F. 2d at 1113; see also 528 F. 2d at 961). As we have already informed the Court, we believe that *Fusco* and *Weyerhaeuser* applied an erroneous legal standard in determining the scope of maritime employment under the Act,[8] but, in any event, this case does not present that issue. Respondent Boudloche's duties here included loading and unloading vessels and moving cargo between vessels and his truck. These tasks manifestly bear a significant relationship to the flow of commerce on navigable waters, and Boudloche was injured during the performance of one such task. Either on the basis of his occupation, therefore, or on the basis of what he was actually doing at the time he was hurt, Boudloche satisfies the status test in Section 2(3) of the Act. See *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82 ("Persons moving cargo directly from ship to land transportation are engaged in maritime employment").

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[8]See 80-639 Brief for the Federal Respondent in Opposition at 7-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05